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ATTACHMENT 11

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JUN 16 1998

OFFICE OF
SOLID WASTE AND EMERGENCY
RESPONSE

MEMORANDUM

SUBJECT: Transmittal of "EPA Guidance on the Transfer of Federal Property by Deed Before All Necessary Remedial Action Has Been Taken Pursuant to CERCLA Section 120(h)(3)"

FROM: Timothy Fields, Jr.
Acting Assistant Administrator

TO: Superfund National Program Managers, Regions I-X
Office of Regional Counsel, Regions I-X

This memorandum transmits the "EPA Guidance on the Transfer of Federal Property by Deed Before All Necessary Remedial Action Has Been Taken Pursuant to CERCLA Section 120(h)(3)," otherwise known as the Early Transfer Guidance. This guidance is for the EPA Regions to use when reviewing requests from federal departments and agencies that are transferring property to defer the CERCLA Section 120(h)(3) covenant that all necessary remedial actions have been taken.

EPA is fully supportive of the early transfer process. When a transferee agrees to conduct the response action, this new authority provides other federal departments and agencies with an opportunity to secure cleanup by having other non-federal parties conduct cleanup. This could yield significant benefits to human health and the environment and savings to the taxpayer. In all instances, however, the landholding federal agency remains responsible for cleanup.

The Early Transfer Guidance benefits from the input of an interagency workgroup composed of EPA, the Department of Defense, the Department of Energy, and the General Services Administration. The interagency workgroup discussed several issues related to early transfer that are covered in this policy. Earlier versions of the guidance were also shared with ASTSWMO. This is, however, an EPA policy, not an interagency product.

The guidance establishes a process by which an EPA regional office should review an early transfer request. This process begins with the transferring federal agency submitting information of a sufficient quality and quantity to EPA which will support its request for a deferral and provide a basis for EPA to make its determination. This information should be submitted to EPA in the form of a Covenant Deferral Request (CDR). At base closure sites

where an early transfer is being sought, EPA anticipates that the Base Closure Team, including the EPA representative, will work together in drafting the CDR to expedite the transfer.

Finally it is important to note that states play an important role in this process regardless of whether the parcel under review is on the National Priority List Federal Facility or not. States must also concur on the early transfer.

I believe this Early Transfer Guidance provides useful information to the Regions to assist federal departments and agencies in expediting the early transfer of property. If you have any questions regarding this guidance, please contact the Federal Facilities Restoration and Reuse Office at (202) 260-9924.

Attachment

cc: Craig Hooks, Federal Facilities Enforcement Office
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EPA Guidance on the Transfer of Federal Property by Deed Before All Necessary Response Action Has Been Taken Pursuant to CERCLA Section 120(h)(3) -- (Early Transfer Authority Guidance)

I. PURPOSE

This guidance addresses the transfer by deed, under Section 120(h)(3)(C) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), of real property listed on the National Priorities List (NPL) held by a federal agency (landholding federal agency[1]) where the release or disposal of hazardous substances has occurred, but where all necessary remedial action has not yet been taken. This document provides guidance to the EPA Regions that have received a request from a landholding federal agency for the deferral of the covenant mandated by CERCLA Section 120(h)(3)(A)(ii)(I) that all necessary remedial action has been taken prior to the date of transfer. This guidance establishes EPA's process to determine, with the concurrence of the Governor, that the property is suitable for transfer prior to all necessary remedial action being taken.

II. EPA's REQUIREMENTS FOR APPROVING A DEFERRAL REQUEST

When a federal agency transfers to another person (i.e., an entity other than another federal agency) real property on which hazardous substances have been stored for one year or more, known to have been released, or disposed of, the deed must contain a covenant warranting that "all remedial action necessary to protect human health and the environment with respect to any such substance remaining on the property has been taken before the date of transfer" (the CERCLA 120(h)(3)(A)(ii)(I) Covenant) and that "any additional remedial action found to be necessary after the date of the transfer shall be conducted by the United States."[2] EPA, with the concurrence of the Governor of the State in which the facility is located, may defer the CERCLA Covenant for parcels of real property at facilities listed on the NPL.[3]

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[1] A landholding federal agency is the federal agency that holds custody and accountability for the property on behalf of the United States. 41 CFR 101-47.103.7

[2] CERCLA Section 120(h)(3)(A)(ii) sets forth the two components of the covenant that shall be contained in each deed. For purposes of this policy and the request for deferral, the term "CERCLA Covenant" refers only to the first component contained in Section 120(h)(3)(A)(ii)(I).

[3] For non-NPL sites, the Governor of the State in which the facility is located may defer the CERCLA Covenant.

The Agency's general current view is that it will seek the concurrence of federally recognized Indian tribes for purposes of determining whether the covenant requirement under CERCLA 120(h) should be deferred pursuant to CERCLA 120(h)(3)(C) for property located in Indian country within tribal jurisdiction. However, the Agency will only make a final determination as to the appropriate tribal role under CERCLA 120(h)(3)(C) in the context of an actual Covenant Deferral Request made for property located in Indian country within tribal jurisdiction. The Agency's determination should be made in light of the specific facts and circumstances surrounding a particular Covenant Deferral Request. If the EPA Regional office receives a Covenant Deferral Request concerning a transfer of property that is located in Indian country with tribal jurisdiction, the EPA Regional office should contact EPA Headquarters, the American Indian Environmental Office and the Federal Facilities Restoration and Reuse Office, for specific guidance.

In order for EPA to defer the covenant requirement, CERCLA Section 120(h)(3)(C)(I)(I)-(IV) requires that EPA determine that the property is suitable for transfer based on a finding that:

1. the property is suitable for transfer for the use intended by the transferee, and the intended use is consistent with protection of human health and the environment;

2. the deed or other agreement proposed to govern the transfer between the United States and the transferee of the property contains the Response Action Assurances described in section IV of this guidance;

3. the federal agency requesting deferral has provided notice, by publication in a newspaper of general circulation in the vicinity of the property, of the proposed transfer and of the opportunity for the public to submit, within a period of not less than 30 days after the date of the notice, written comments on the suitability of the property for transfer; and

4. the deferral and the transfer of the property will not substantially delay any necessary response action at the property.

These findings are intended to assure that there is a sound basis for the proposed transfer based on the finding that the particular reuse of the property identified by the transferee does not pose an unacceptable risk[4] to human health or the environment. As

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[4] See, 40 CFR 300.430(d)(4) and U.S. EPA 1989a. *Risk Assessment Guidance for Superfund* (RAGS): *Volume 1: Human Health Evaluation Manual* (HHEM), *Part A, Interim Final and Part B, Development of Risk-Based Preliminary Remediation Goals.* Office of Emergency and Remedial Response, Washington, D.C. EPA /540/1-89/002, NTIS PB90-

stated in Section 120(h)(3)(C)(iv), all statutory obligations required of a federal agency remain the same, regardless of whether the property is transferred subject to a covenant deferral.

III. APPLICABILITY AND SCOPE

This guidance applies to all early transfers by deed under CERCLA Section 120(h) of contaminated real property owned by a federal agency and listed on the National Priorities List (NPL), regardless of the statutory authority underlying a cleanup, including transfers of property at DoD installations selected for closure or realignment.

This guidance does not apply to federal-to-federal transfers of property or to transfers of uncontaminated property. A federal agency that is sponsoring a public benefit conveyance may use this guidance as a model for obtaining useful information. Under a public benefit conveyance, a sponsoring federal agency acts as a conduit through which title will ultimately pass from the United States to a public benefit recipient. For further information regarding the relationship between a sponsoring federal agency and the Department of Defense (DoD) for Base Realignment and Closure (BRAC) property (a landholding federal agency), please see the Memorandum of Agreement signed by DoD and the federal agencies that sponsor public benefit transfers (dated April 21, 1997).

IV. GUIDANCE

EPA should generally not consider deferral of the covenant request for real property unless the landholding federal agency submits a Covenant Deferral Request (CDR) containing the information recommended by this guidance.

While the statute does not explicitly require a signed Interagency Agreement (IAG) to be in place as a prerequisite for deferring the covenant requirement, EPA believes that the existence of an IAG will significantly aid the Agency in making the covenant deferral decision.

A. Covenant Deferral Request

As discussed in Section II, EPA may defer the CERCLA Section 120(h)(3) covenant requirement if EPA determines that a property is suitable for transfer based on certain findings. To commence the process, the landholding federal agency should submit information of a sufficient quality and quantity to EPA to support its request for deferral and provide a basis for EPA to make its determination. This information should be submitted to EPA in the form of a Covenant Deferral Request (CDR). EPA should consider a CDR complete when it includes all of the following components.

155581/CCE and Publication 9285.7-01B NTIS PB92-963333.

1. Property Description

A legal description of the real property or sufficient information which clearly identifies the property for which the CERCLA Covenant is requested to be deferred.

2. Nature/Extent of Contamination

A description of the nature and areal extent of contamination (with supporting documentation) which affects the property to be transferred and which will not be remediated prior to transfer. There is a presumption that the Covenant Deferral Request should include the results from a completed Remedial Investigation (RI) for the parcel that will be transferred. However, the landholding federal agency should have an opportunity to demonstrate why such data and findings are not necessary before the land is transferred. An example of when this may occur is where the intended use will be very similar to or the same as current use (e.g., airport runways), and there are already appropriate access controls, institutional controls, etc. in place or response actions have mitigated exposure (e.g., removals). In such instances these actions should prevent the creation of new exposure pathways or create conditions that already protective.

Contents of the Covenant Deferral Request (CDR)

- *Property Description*
- *Nature/Extent of Contamination*
- *Analysis of Intended Future Land Use During the Deferral Period*
- *Risk Assessment*
- *Response/Corrective Action Requirements*
- *Operation and Maintenance Requirements*
- *Contents of Deed*
- *Responsiveness Summary*
- *Transferee Response Action Assurances and Agreements*

When determining what information is necessary, the EPA Region should take into consideration, at a minimum, the degree of uncertainty regarding the nature and extent of contamination; the future use of the property prior to completion of the response action; who is to perform future work; and any existing information or data on the parcel under consideration. Generally, the greater the uncertainty about any of these factors, the more information the EPA Region may require to make the determination. As noted below, the landholding Federal agency remains responsible for all necessary response actions including the remedial investigation

and the cleanup remains subject to the requirements of Section 120.

3. Analysis of Intended Land Use During the Deferral Period

A description of the intended land use of the property during the deferral period and an analysis of whether the intended use is reasonably expected to result in exposure to CERCLA hazardous substances at sites where response actions have not been completed. This analysis should be based on the environmental condition of the property and should consider the contaminant(s), exposure scenarios, and potential and actual migration pathways that may occur during the future use. Where a potential or actual unacceptable exposure to hazardous substances is identified, the analysis should identify what response actions should be taken to prevent such exposure. Treatment, engineering controls and use restrictions (see Section 6.d - Response Action Assurances), may be considered as a means of limiting unacceptable exposures to hazardous substances while allowing for property reuse. Any other response actions necessary to protect human health and the environment should be included in the deed (or other agreement governing the transfer) as described in Subsection 6 of this policy. The land use during the deferral period cannot be inconsistent with any necessary response actions.

4. Results From A Risk Assessment

Results from a CERCLA risk assessment, taking into consideration reasonably anticipated future land use assumptions. There is a presumption that the Covenant Deferral Request include the results from a completed risk assessment, as defined in the National Continency Plan (NCP) and EPA guidance. However, the landholding federal agency should have an opportunity to demonstrate why a risk assessment does not have to be completed before the land is transferred. An example of when this may occur is when the intended use will be similar to or the same as current use (e.g., airport runways), and there are already appropriate access controls, institutional controls, etc. in place or response actions have mitigated exposure (e.g., removals). In such instances these actions should prevent the creation of new exposure pathways or create conditions that already protective.

When determining whether a completed risk assessment is needed before the early transfer, the EPA Region should take into consideration, at a minimum, the degree of uncertainty regarding the potential risks posed by the contamination; existing analyses; certainty about future use; and who is conducting the response. The greater the uncertainty about the risk from the contamination, the more information EPA may require. As noted below, the landholding Federal agency remains responsible for all necessary response actions, including the risk assessment.

In the absence of the completed risk assessment, at a minimum, EPA Regions should examine potential exposure(s) during the deferral period, taking into account any proposed restrictions to ensure the protectiveness of human health and the environment.

5. Response/Corrective Action and Operation and Maintenance Requirements

A description of any ongoing or planned response or corrective action, including a projected milestone date for the selection and completion of the action, and/or projected date for the demonstration that a remedial action is "operating properly and successfully." Also, it will be necessary to provide adequate information regarding ongoing or planned response actions and operation and maintenance of the response or corrective action.

6. Contents of Deed/Transfer Agreement

a. Notice

A copy of the notice to be included in the deed as required by CERCLA Section 120(h)(1)and(3) and in accordance with regulations set forth at 40 CFR Part 373.

b. Covenant

A copy of the covenant warranting that any additional remedial action found to be necessary after the date of transfer shall be conducted by the United States as required by CERCLA Section 120(h)(3)(A)(ii)(II).

c. Access

A copy of the clause which reserves to the United States access to the property in any case in which an investigation, response, or corrective action is found to be necessary after the date of transfer as required by CERCLA Section 120(h)(3)(A)(iii).

d. Response Action Assurances

A copy of the Response Action Assurances that must be included in the deed or other agreement proposed to govern the transfer as required under CERCLA Section 120(h)(3)(C)(ii). As required by statute, these assurances shall:

I. provide for any necessary restrictions on the use of the property to

ensure the protection of human health and the environment;

ii. provide that there will be restrictions on the use necessary to ensure that required remedial investigations, response action, and oversight activities will not be disrupted;

iii. provide that all necessary response action will be taken and identify the schedule(s) for investigation(s) and completion of all necessary response action(s) as approved by the appropriate regulatory agency; and

iv. provide that the landholding federal agency has or will obtain sufficient funding through either: (a) submission of a budget request (or budget requests in the event multi-year funding is needed) to the Director of the Office of Management and Budget that adequately addresses schedule for investigation and completion of all necessary response action, subject to congressional authorizations and appropriations; or (b) sufficient current appropriations to accomplish investigation(s) and completion(s) of all necessary response action(s). In addition to (a) or (b), the landholding federal agency may also have an agreement with the transferee to fund and/or accomplish all or part of the remediation.

The Response Action Assurances should include a description of requirements to assure the protectiveness of the response action and shall specify the mechanisms for assuring that such measures remain effective. These measures should reflect discussions among the reuse entity, the community, the landholding federal agency and any appropriate federal, State, or local government.

7. Responsiveness Summary

The final CDR should include a response to comments document which contains the landholding federal agency's responses to the written comments received during the public comment period under Section 120 (h)(3)(C)(I)(III) and to the written comments received from the regulatory agencies on the draft CDR.

8. Transferee Response Action Assurances and Agreements

A transferee may agree to conduct response actions on the property. However, the landholding Federal agency remains responsible for ensuring that all necessary response actions including , as appropriate, investigations and requirements under an IAG are done.

When property is transferred prior to completion of the cleanup, the landholding federal agency should include in each deed provisions notifying the transferee of

the requirement for, and status of, an Interagency Agreement or other enforceable environmental cleanup agreement or order, as appropriate.

The landholding federal agency should also notify the transferee that EPA and the State and their agents, employees and contractors, will have rights of access as necessary to implement response actions and oversight responsibilities at the facility.

Where the transferee has agreed to fund and conduct the cleanup or portions of the cleanup as a condition of the transfer, the landholding federal agency should provide to EPA documentation demonstrating that the transferee has or will become legally obligated to conduct the required response actions in accordance with the existing IAG. Should the transferee become unable or unwilling to complete the cleanup or order under its agreement with the landholding federal agency, EPA expects the landholding federal agency will complete the cleanup. Nothing in this guidance shall be interpreted to affect EPA's or the landholding federal agency's authority or responsibility under CERCLA or any other federal statute to enforce the terms and conditions of an existing IAG or to limit EPA's authority to impose requirements necessary to protect public health and the environment.

If the transferee is expected to perform any response action (e.g., excavation of contaminated soil in an area where facilities are to be constructed), then EPA should receive assurance from the landholding federal agency that the transferee has:

a. the technical capacity (in-house or through appropriate contract management) to perform anticipated investigations and response or corrective actions; and

b. the financial capacity to execute environmental cleanup activity requirements that are known or can reasonably be anticipated, based on current information available.

Financial capacity may be an especially sensitive area for a transferee and/or the landholding federal agency. While the assurance does not need to contain the actual documentation of the financial capacity, the EPA Region may request such information from the landholding federal agency if there are questions in this regard.[5] Any proprietary or confidential business information should be handled

[5]Financial capacity may be demonstrated through, but not limited to: reasonably anticipated cash flows, existence of appropriate insurance, posting of a construction/ indemnity bond, authority of the transferees to issue revenue bonds for such purpose, or assets, excluding

as required under Federal regulations.

If the landholding federal agency submits information supporting the technical and financial assurances, but the EPA Region disagrees with the adequacy of such assurances, and they cannot resolve their differences, there will be the opportunity to elevate the disagreement to the federal agency headquarters and EPA Headquarters. The EPA Region should contact the Federal Facilities Restoration and Reuse Office in OSWER and the federal agency should elevate the issue to its headquarters component when resolution cannot be reached at the Senior Manager level. EPA Headquarters and the headquarters of the landholding federal agency will resolve the disagreement in an expeditious fashion so as not to delay transfer.

The transferee should agree to conduct all necessary environmental response actions in accordance with CERCLA and the National Contingency Plan (NCP). In the case where the transferee does not perform cleanup in accordance with CERCLA and the NCP or the terms of a cleanup agreement, then the United States may enter the property and perform any necessary response action.

B. Process for Requesting Covenant Deferral

Before preparing a CDR, the landholding federal agency should notify the Administrator of EPA or designee and the Governor of the State of the intent to request a CERCLA Covenant Deferral and invite participation in the development and review of the draft CDR. This notice should allow sufficient time for EPA, and State agencies, to participate in the development and review and comment on a draft CDR.

As required by Section 120(h)(3)(C)(I)(III), the landholding federal agency must provide notice, by publication in a newspaper of general circulation in the vicinity of the property, of the proposed transfer. The notice should include:

1. The identity of the property proposed for transfer, the proposed transferee and the intended use of the property;

2. A statement that the property is listed on the National Priorities List and that the proposed transfer is pursuant to CERCLA 120(h)(3)(C) which allows the transfer of federal property before remedial action is completed when certain conditions are satisfied;

3. An assessment of whether the transfer is consistent with protection of human

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the real property to be transferred. Obtaining a security interest in the transferee's assets may be used as a means of assuring project completion.

health and the environment will be made only after a comprehensive evaluation of the environmental condition of the property in consultation with the U.S. EPA and the appropriate State agencies;

4. A summary of the decision-making process, e.g., that the property will not be transferred until U.S. EPA determines, with the Governor's concurrence, that the transfer of the property for use as intended is consistent with protection of human health and the environment and that the federal agency has provided assurance that response actions will be taken;

5. The address and telephone number of the agency office which may be contacted for obtaining a copy of the draft Covenant Deferral Request, site-specific information and the address of the location of the administrative record for the response program; and

6. A statement that interested members of the public may comment on the suitability of the property (the draft Covenant Deferral Request) for transfer and must submit such comments to the agency before a date not less than 30 days from the date of the publication of the notice.

It is also recommended that the draft CDR be made available to any existing Restoration Advisory Boards (RAB), Site Specific Advisory Boards (SSAB), affected local governments, and/or other interested community-based groups. Specific efforts should be made to involve tribes surrounding the property that is to be transferred. As stated in the notice requirement, the public shall be provided with at least a 30 day period in which to submit comments on the suitability of the property for transfer. It may be appropriate under certain circumstances (i.e., large and/or complicated land transfers) to extend the public comment period beyond 30 days.

After the public comment period has expired, the landholding federal agency may then submit the final CDR to the appropriate EPA Regional office and State representative. Property cannot be transferred by deed until the CERCLA Covenant is explicitly deferred by EPA and the State. The request to defer the CERCLA Covenant should be made simultaneously to the EPA and the State. EPA and the State should work closely to assure careful evaluation of the request. EPA Regional offices are encouraged to take steps to streamline the coordination process to avoid unnecessary delay.

C. Completion of Response Actions After Transfer

When all response actions necessary to protect human health and the environment have been taken, e.g., when there has been a demonstration to EPA that the approved

remedy is "operating properly and successfully[6]" pursuant to CERCLA Section 120(h)(3)(B) (regardless of whether the landholding federal agency or the transferee has taken the action), the landholding federal agency shall execute and deliver to the transferee an appropriate document containing a warranty that all such response action has been taken. This warranty will satisfy the requirement of CERCLA Section 120(h)(3)(A)(ii)(I).

V. NOTICE

This guidance and internal procedures adopted for implementation are intended solely as policy for employees of the US EPA. Such guidance and procedures do not constitute rule making by the Agency and do not create legal obligations. The extent to which EPA applies this guidance will depend on the facts of each case.

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[6] See, *"Guidance for Evaluation of Federal Agency Demonstrations That Remedial Actions Are Operating Properly and Successfully Under CERCLA Section 120(h)(3),"* August 1996, NTIS PB97-143770; http://www.epa.gov/swerffrr.